

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

KENNETH J. PHELAN,

Plaintiff,

**9:10-cv-11
(GLS/RFT)**

v.

HERSH et al.,

Defendants.

APPEARANCES:

OF COUNSEL:

FOR THE PLAINTIFF:

Kenneth J. Phelan
Pro Se
09-A-1183
Five Points Correctional Facility
Caller Box 119
Romulus, NY 14541

FOR THE DEFENDANTS

HON. ERIC T. SCHNEIDERMAN
New York State Attorney General
Albany Office
The Capitol
Albany, NY 12224

ADRIENNE J. KERWIN
Assistant Attorney General

**Gary L. Sharpe
District Court Judge**

MEMORANDUM-DECISION AND ORDER

I. Introduction

Plaintiff *pro se* Kenneth J. Phelan brings this action under 42 U.S.C.

§ 1983, alleging his constitutional rights were violated by defendants. (See Compl., Dkt. No. 1.) In a Report-Recommendation and Order (R&R) filed September 13, 2011, Magistrate Judge Randolph F. Treece recommended that defendants' motion to dismiss be granted in part and denied in part.¹ (See *generally* R&R, Dkt. No. 63.) Pending are Phelan's objections to the R&R. (See Dkt. No. 68.) For the reasons that follow, the R&R is adopted in its entirety.

II. Standard of Review

Before entering final judgment, this court routinely reviews all report and recommendation orders in cases it has referred to a magistrate judge. If a party has objected to specific elements of the magistrate judge's findings and recommendations, this court reviews those findings and recommendations *de novo*. See *Almonte v. N.Y. State Div. of Parole*, No. 04-cv-484, 2006 WL 149049, at *6-7 (N.D.N.Y. Jan. 18, 2006). In those cases where no party has filed an objection, or only a vague or general objection has been filed, this court reviews the findings and recommendations of the magistrate judge for clear error. See *id.*

¹ The Clerk is directed to append the R&R to this decision, and familiarity therewith is presumed.

III. Discussion

Phelan's "objections" consist of factual statements which were either not alleged in his Complaint, or already considered by Judge Treece. (See Dkt. No. 68 at 1-5.) As Phelan is well aware—given the fact that he has filed nineteen lawsuits in this district alone—the sufficiency of a complaint is judged by the factual allegations contained therein. See *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007) (The court's review is limited to the "four corners of the complaint . . ."). Thus, Phelan's attempt to cure the deficiencies in his Complaint are unavailing. More importantly though, Phelan's "objections" are insufficient to require a *de novo* review as there is no reference to a perceived error by Judge Treece. Having found no clear error in the R&R, the court accepts and adopts Judge Treece's R&R in its entirety.

IV. Conclusion

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that Magistrate Judge Randolph F. Treece's September 13, 2011 Report-Recommendation and Order (Dkt. No. 63) is **ADOPTED** in its entirety; and it is further

ORDERED that defendants' motion to dismiss (Dkt. No. 55) is

DENIED in part with respect to the following:

- (1) the retaliation claims against defendants Hersh and Thomas, relating to their cell search on April 2, 2009;
- (2) the retaliation claims against defendants Thomas and Scott, relating to misbehavior reports issued pursuant to the April 2, 2009 cell search; and
- (3) the Eighth Amendment excessive force claims against defendant Micheals, relating to striking Phelan in the head several times; and it is further

ORDERED that defendants' motion to dismiss (Dkt. No. 55) is **GRANTED** without prejudice as to all of the other claims against defendants; and it is further

ORDERED that in accordance with the Mandate of the United States Court of Appeals for the Second Circuit (see 9:10-cv-12, Dkt. No. 25), this case is consolidated with Case No. 9:10-cv-12; and it is further

ORDERED that 9:10-cv-11 shall be the lead case and 9:10-cv-12 shall be the member case; and it is further

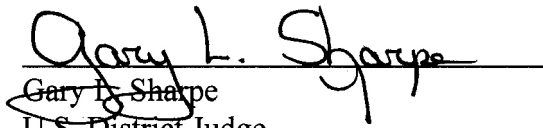
ORDERED that Magistrate Judge Treece shall, in accordance with the Second Circuit's Mandate, appoint counsel; and it is further

ORDERED that the parties shall contact Magistrate Judge Treece to schedule further proceedings; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties by mail and certified mail.

IT IS SO ORDERED.

December 5, 2011
Albany, New York


Gary L. Sharpe
U.S. District Judge